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No. 75-1594

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

KENNEBEC LOG DRIVING COMPANY, SCOTT PAPER COMPANY, HUDSON PULP & PAPER CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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Petitioners have requested the Court to grant a writ of certiorari in this case because (1) the Court of Appeals' decision embraces an interpretation of the so-called Refuse Act[1] diametrically opposed to this Court's authoritative construction of that statute in *United States* v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973) (*"PICCO"*) and (2) the decision below, if allowed to stand, would impose upon an im-

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[1] Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407.

portant and Congressionally-sponsored industry the Hobson's choice of shutting down or facing the risk of substantial criminal and civil penalties as well as private damage suits.

The Brief for the United States in Opposition, after attempting to skew the Court's perception of the case by misstating the facts,[2] begins with a somewhat odd point; it emphasizes at the outset that the Government's demand for prospective injunctive relief "has been rendered largely academic by the enactment . . . of a [Maine] statute prohibiting all log-driving . . . as of October 1, 1976 . . . , and by petitioners' publicly stated intention to end their log drives . . . [by the same date]." (Brief in Opposition 5) In fact, the single remaining participant in the Kennebec Log Drive made this public announcement several months *before* this suit was filed. As far as prospective relief is concerned, therefore, this case has been "academic" from its inception.

The point, however, is irrelevant to this petition. The importance of this case has nothing to do with the Governmert's unnecessary request for prospective relief. The need for review by this Court stems rather from the fact that the decision below, if allowed to stand, would force logging operators throughout the country to halt immediately the water transportation of logs or face the risk of criminal or civil prosecution and possibly numerous private damage suits.

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[2] There is no evidence, nor is it the fact, that the logs and bits of bark which sink during the Kennebec log drives have "consumed all the oxygen in the water, thereby preventing acquatic [sic] life." (Brief in Opposition 2) The assertion has been made up out of whole cloth.

The Government does not contest the precedential importance of the decision below, nor the sizable magnitude of the industry affected (*see* Petition 12 & n.6). It does suggest that review would be premature because the District Court might, on remand, deny the Government's demand for retrospective relief to eliminate the supposed effects of log-driving on the Kennebec River. (Brief in Opposition 5) But this narrow focus upon the procedural posture of the case vis-a-vis the parties directly involved ignores the precedential importance of the decision below, which would not be affected by any further proceedings involving relief, and the possibility of damage litigation. In view of the latter threat, it is simply incorrect for the Government to say, as it does, that if all injunctive relief is ultimately denied, "petitioners would no longer have, any cause for complaint." (Brief in Opposition 5) The decision below raises the threat of most serious consequences, and it is completely final on the only issue as to which certiorari review is sought.[3]

The Government's argument that "the decision below is, in any event, correct" (Brief in Opposition 5) is equally wide of the mark. The issue at this point, of

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[3] It might be observed that if the Government in fact thinks it likely that the District Court will deny its request for retrospective relief, its reasons for filing this lawsuit would seem all the more mysterious. But even on this narrow point, if the Court of Appeals' decision on liability is (as petitioners' contend) erroneous, there is no reason why the District Court and the parties should be compelled to engage in expensive and time-consuming proceedings examining the supposed effects of log-driving on the Kennebec River and the alleged need for an enormously expensive and ecologically disruptive clean-up program.

course, is not the ultimate correctness of the decision below but whether review by this Court is appropriate. Both the District Court and the Court of Appeals, in certifying and accepting this case for interlocutory appeal under 28 U.S.C. § 1292(b), have taken the position that there is "substantial ground for difference of opinion" regarding the applicability of the Refuse Act to the necessary incidents of lawful navigation, and that consensus on the part of the courts below argues in favor of a final, authoritative determination by this Court.

It is important, at this stage, to prevent confusion regarding the question decided by the Court of Appeals. Contrary to the Government's apparent misunderstanding (Brief in Opposition 6-8), the issue is whether Congress, when it enacted the statute in 1899, intended the Refuse Act to apply to the necessary incidents of lawful navigation (whether bark "discharged" during log drives or motor oil "discharged" by vessel navigation (*see* Petition 8)), *not* whether it "repealed" that statute insofar as log-driving is concerned the following year by enacting the Act of May 9, 1900, 33 U.S.C. § 400. Consequently, no question of a "repeal by implication" arises. (Brief in Opposition 7)

Petitioners contend (a) that this Court has authoritatively construed the Refuse Act in *PICCO* as an absolute prohibition against deposits of refuse material into navigable waters, subject only to the wholly discretionary power of the Secretary of the Army to establish a permit program, and (b) that Congress could not logically have expected such a prohibitory statute to apply to the necessary incidents of lawful navigation—such navigation being, unquestionably, at least one of the activities the statute was enacted to

protect. The Court of Appeals rejected this argument by adopting an interpretation of the Refuse Act which is fundamentally at odds with the holding of *PICCO*. By its analysis, the Refuse Act should be viewed historically only as a regulatory statute.

Reasonable men could perhaps differ as to the prohibitory versus the regulatory thrust of the Refuse Act. But the Government cannot have it both ways. A basic sense of fairness—let alone logic—should lead this Court to correct a situation in which

> (1) persons prosecuted under the Refuse Act are precluded from defending on the ground that the required regulatory permit program has not been established— because the statute was intended to be prohibitory (*PICCO*),

while at the same time

> (2) persons whose only "deposits" of "refuse" are undisputedly the necessary incidents of lawful navigation are not allowed to argue that Congress could not have intended to prohibit navigation (which a prohibition against its necessary incidents would, of course, be tantamount to)—because the statute was intended to be merely regulatory (this case).

Congress did not contemplate nor should this Court countenance any such revolving door.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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